DOCUMENT RESUME

ED 346 693 EC 301 308

TITLE Student Access: Section 504 of the Rehabilitation Act of 1973.
INSTITUTION Oregon State Dept. of Education, Salem.
PUB DATE 90
NOTE 42p.
AVAILABLE FROM Oregon Department of Education, Publication Sales Clerk, 700 Pringle Parkway, S.E., Salem, OR 97310-0290 ($3.50).
PUB TYPE Legal/Legislative/Regulatory Materials (090) -- Guides - Non-Classroom Use (055)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Accessibility (for Disabled); *Access to Education; Acquired Immune Deficiency Syndrome; Alcoholism; *Civil Rights; *Disabilities; Drug Addiction; Due Process; Educational Legislation; Elementary Secondary Education; Employment; Equal Education; Federal Aid; *Federal Legislation; Hearings; Parent Rights; Student Rights
IDENTIFIERS Education of the Handicapped Act 1970; Oregon; *Rehabilitation Act 1973 (Section 504)

ABSTRACT

This paper addresses educational implications of Section 504 of the Rehabilitation Act of 1973 which prohibits programs receiving federal financial assistance from denying services to or discriminating against individuals with disabilities. Individual sections cover: legal definitions (e.g., "individual with handicaps" and "discrimination"); procedural requirements of Section 504; school district obligations for elementary and secondary education; special issues regarding students addicted to drugs or alcohol; special considerations for students having AIDS (Acquired Immune Deficiency Syndrome) or HIV (Human Immunodeficiency Virus) infection; program accessibility; employment practices; and major differences between the Education of the Handicapped Act (EHA) and Section 504. Appendices include a sample letter to parents; various Office of Civil Rights Senior Staff Memoranda on legal questions; and a report on an Oregon due process hearing for an alcoholic student. (DB)

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Section 504 of the Rehabilitation Act of 1973

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Contents

Introduction 1

Definitions 1

Procedural Requirements of Section 504 5

School District Obligations for Elementary and Secondary Education 6

Special Issues Regarding Students Addicted to Drugs or Alcohol 9

Special Considerations for Students Having AIDS or HIV Infection 11

Program Accessibility 11

Employment Practices 12

Major Differences Between the EHA and Section 504 16

Appendices
- Sample Letter to Parent
- OCR Senior Staff Memoranda
- Oregon Due Process Hearing on Alcoholic Student

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Introduction

With the onset of AIDS and the increased numbers of students addicted to drugs and alcohol, Section 504 of the Rehabilitation Act is receiving more and more attention. Law conferences dealing with student rights invariably include workshops on Section 504. The Office for Civil Rights has stepped up its enforcement of Section 504. Moreover, since the Oregon Department of Education is required to resolve complaints of violations of federal law, parents are bringing Section 504 issues to ODE for resolution.

Special education administrators have requested that the Department provide technical assistance to school districts to assure compliance with the statute. This paper is the result of the work of special education administrators, experts and Department staff.

Section 504 of the Rehabilitation Act of 1973 is a civil rights statute which provides that: "No otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of his/her handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or activity conducted by any Executive agency or by the United States Postal Service." *(29 USC § 794)* This short paragraph has far reaching implications for school districts which this paper hopes to address.

Definitions

What is a "program or activity"?

The term includes all programs or activities of the Oregon Department of Education and all school districts receiving federal funds regardless of whether the specific program or activity involved is a direct recipient of federal funds. (E.g., If a district contracts with alternative education programs, the district must insure that a student with disabilities has an equal opportunity to participate in alternative education, even though the programs themselves do not receive any federal funds.) *34 CFR § 104.3(f); Civil Rights Restoration Act of 1988 (PL 100-259)*

Who is a "qualified" individual with handicaps?

For school districts, all school-age children (5 to 21), are qualified. *34 CFR § 104.3(k)* When PL 99-457 goes into effect in 1991, pertaining to early intervention services for preschool children, Section 504 *may* have implications for school districts serving children younger than 5 years. Parents who have a handicapping condition are also protected by Section 504. For example, a district should provide an interpreter or some other equivalent service to a parent who is deaf in order to insure that s/he has an equal opportunity to participate in school initiated activities. For information on the meaning of "qualified" as it pertains to employees, see the Employment Practices Section of this paper.

Who is an "individual with handicaps"?

There are three ways that a person may qualify as an individual with handicaps under the regulations. A person is considered handicapped under Section 504 if s/he:

1. Has a physical or mental impairment which substantially limits one or more major life activities (e.g., any student receiving services under the Education of Handicapped Children Act (EHA); drug addicted or alcoholic students; students with diabetes). The term does not cover children disadvantaged by cultural, environmental or economic factors. *Comment to 34 CFR § 104.3*

2. Has a record or history of such an impairment (e.g., a student with learning disabilities who has been decertified as eligible to receive special education under the EHA; a student who had cancer; a student in recovery). The term includes children who have been misclassified (e.g., a non-English speaking student who was mistakenly classified as having mental retardation).

3. Is regarded as having such an impairment. A person can be found eligible under this section if s/he:

   a. has a physical or mental impairment that does not substantially limit a major life activity but is treated by the district as having such a limitation (e.g., a student who has scarring, a student who walks with a limp);

   b. has a physical or mental impairment that substantially limits a major life activity only as a result of the attitudes of others towards such impairment (e.g., a student who is obese); or

   c. has no physical or mental impairment but is treated by the district as having such an impairment (e.g., a student who tests positive with the HIV virus but has no physical effects from it).

   34 CFR § 104.3(j)

What is a "major life activity"?

Major life activities include walking, seeing, hearing, speaking, breathing, learning, working, caring for oneself and performing manual tasks. The handicapping condition need only substantially limit *one* major life activity in order for the student to be eligible. *34 CFR § 104.3(j)*

What is the difference between Section 504 and the EHA as to who is protected?

The EHA specifically lists types of disabling conditions which render a child entitled to receive special education. Additionally, in order to be entitled to receive services under the EHA, the disabling condition must result in a need for special education.

Section 504 is much broader than the EHA—there is no categorical listing of disabling conditions. However, if a child is EHA-eligible, s/he will also be protected under Section 504. The regulations also make clear that certain conditions, such as drug or alcohol addiction, heart disease, etc., which would not qualify a child under the EHA, may be handicapping conditions under Section 504. While Section 504 requires that the condition "substantially limit a major life activity" such as walking, it need not necessarily adversely affect the student's educational performance.

Examples of other potentially handicapping conditions under Section 504 if they substantially limit a major life activity, not typically covered under the EHA:

1. Communicable diseases: AIDS, AIDS related complex (ARC) or asymptomatic carriers of the AIDS virus (HIV); tuberculosis

2. Temporary handicapping conditions: Students injured in accidents or suffering short-term illnesses

3. Attention Deficit Disorder (ADD)

4. Behavior disorders

5. Chronic asthma and severe allergies

6. Physical handicaps such as spina bifida, hemophilia and conditions requiring children to use crutches

7. Diabetes.

Note that some of these conditions, such as tuberculosis, diabetes and hemophilia may be severe enough to affect educational performance and therefore fall under the EHA as well.

How is discrimination defined?

Discrimination under Section 504 occurs when a recipient of federal funds:

1. Denies a handicapped person the opportunity to participate in or benefit from an aid, benefit or service which is afforded nonhandicapped students (e.g, district practice of refusing to allow any student on an IEP the opportunity to be on the honor roll; denial of credit to a student whose absenteeism is related to his/her handicapping condition; expelling a student for behavior related to his/her handicapping condition; refusing to dispense medication to a student who could not attend school otherwise).

2. Fails to afford the handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is *equal* to that afforded others (e.g., applying an OSAA policy that conditions interscholastic sports eligibility on the student's receiving passing grades in five subjects without regard to the student's handicapping condition).

3. Fails to provide aids, benefits, or services to the handicapped person that are *as effective* as those provided to nonhandicapped persons (e.g., placing a student with a hearing impairment in the front row as opposed to providing her with an interpreter). Note: "Equally effective" means *equivalent* as opposed to *identical*. Moreover, to be *equally effective*, an aid, benefit or service need not produce equal results; it must merely afford an equal opportunity to achieve equal results. *Comment to 34 CFR 104.4(b)(2)*

4. Provides different or separate aids, benefits or services unless such action is necessary to be as effective as the aids, benefits or services provided to nonhandicapped students (e.g., segregating students in separate classes, schools or facilities, unless necessary).

5. Aids or perpetuates discrimination by providing significant assistance to an agency, organization or person that discriminates on the basis of handicap (e.g., sponsoring a student organization that excludes persons with handicaps).

6. Denies a person with handicaps the opportunity to participate as a member of a planning or advisory board strictly because of his/her handicapping condition.

7. Otherwise limits the enjoyment of any right, privilege, advantage or opportunity enjoyed by others (e.g., prohibiting a person with a physical disability from using a service dog at school).

8. In determining the site or location of a facility, makes selections which effectively excludes persons with disabilities, denies them the benefits of, or otherwise subjects them to discrimination. In *Hendricks v. Gilhool, EHLR 441:352 (1989)*, the Pennsylvania Department of Education was found to have violated this section and the EHA by allowing students with disabilities to be located in inferior facilities, such as trailers, wings in basements and unnecessarily restrictive classrooms due to a lack of classroom space. *34 CFR § 104.4*

Procedural Requirements of Section 504

To be in compliance with Section 504, school districts must do the following:

1. Provide written assurance of nondiscrimination whenever the district receives federal money (e.g., on the LEA application). *34 CFR § 104.5(a)* See also OAR 581-21-045 to 581-21-049 for state guidelines requiring equal educational opportunities for students with handicapping conditions.

2. Designate an employee to coordinate compliance with Section 504 (if there are more than 15 employees). *34 CFR § 104.7(a)*

3. Provide grievance procedures to resolve complaints of discrimination (if more than 15 employees); this does not apply to denial of employment. *34 CFR § 104.7(b)* See also *OAR 581-21-049* for state rule requiring that each district have written grievance procedures to resolve discrimination complaints. Note: students, parents or employees are entitled to file grievances.

   A grievance procedure like that afforded to parents under the Family Education Rights and Privacy Act for resolving disputes about student records would suffice.

4. Provide notice to students, parents, employees, unions, and professional organizations of nondiscrimination in admission or access to, or treatment or employment in, its programs or activities (if more than 15 employees). Notice must also specify the responsible employee. Notice must be included in student/parent handbook. *34 CFR § 104.8*

5. Annually identify and locate all Section 504 qualified handicapped children in the district's geographic area who are not receiving a public education. *34 CFR § 104.32(a)*

6. Annually notify handicapped persons and their parents or guardians of the district's responsibilities under Section 504. *34 CFR § 104.32(b)*

7. Provide parents or guardians with procedural safeguards:

   a. Notice of their rights (a sample notice can be found in the appendix)

   b. An opportunity to review relevant records

   c. An impartial hearing. The Department of Education has an administrative rule for regulating due process hearings under Section 504. *See OAR 581-15-109* It is important that parents or guardians be notified of their right to request a hearing

regarding the identification, evaluation, or educational placement of persons with handicapping conditions. If the district proposes to change the student's placement and the parent files a request for a hearing, the district is obligated to maintain the student's placement until administrative proceedings are completed. *OAR 581-15-080(2)(e); 34 CFR § 104.36*

School District Obligations for Elementary and Secondary Education

1. Free Appropriate Education

Districts must provide a free appropriate education (regular or special education and related aids and services) to Section 504 handicapped school-age children in the district's jurisdiction. Instruction must be individually designed to meet the needs of the student as adequately as the needs of nonhandicapped students. Note that this standard of what is "appropriate" differs from the EHA "appropriate" standard which requires the district to design a program reasonably calculated to confer educational benefit. Section 504 requires reasonable accommodations; the EHA requires more.

Although Section 504 does not require school districts to develop an IEP with annual goals and objectives, it is recommended that the district document that the MDT* convened and specified the agreed-upon services.

The quality of educational services provided to students with disabilities must be equivalent to the services provided to nonhandicapped students. Teachers must be trained in the instruction of persons with the handicap in question and appropriate materials and equipment must be available. *Comment to 34 CFR § 104.33(b)* (E.g., A district which has a policy of providing one hour per day homebound instruction to all persons with handicaps is discriminatory because the policy fails to give consideration to the individual needs of the student.)

NOTE: The child does not have to need special education in order to be qualified under Section 504. *34 CFR § 104.33(a)(b)*

*MDT = multidisciplinary team

a. Transportation

If a district places a student in a program not operated by the district, the district must assure that adequate transportation to and from the program is provided at no greater cost than the parent would have paid to transport the child to the district. *34 CFR § 104.33(c)(2)* If a district provides transportation to all its students within a certain geographic area, it may not discriminate in its provision of transportation to students with handicaps. *34 CFR § 104.4(b)(i)*

If a district proposes to terminate a qualified student's bus transportation for inappropriate bus behavior, the district must first determine the relationship between the student's behavior and his/her handicapping condition and provide the parent with notice of his/her rights. Note that the length of the bus rides for students with disabilities should not be longer than that of nonhandicapped students.

b. Residential placement

Must be provided at no cost to the parent or guardian only if necessary to provide a free appropriate education. *34 CFR § 104.33(c)(3)*

c. Out-of-district placements

If the district affords a free appropriate education to a student but the parent chooses to place the child elsewhere, the district is not responsible to pay for the out-of-district placement. *34 CFR § 104.33(c)(4)* This provision is identical to language contained in the EHA. For example, if the district's program is appropriate and the parent places the child in a private school, the district is not responsible for the student's tuition.

2. Evaluations

a. If a student needs or is believed to need special education or related services, the district must evaluate the student prior to initial placement in a regular or special education program and before any "significant change in placement." *34 CFR § 104.35(a)*

   A full evaluation is not required when neither the district nor the parents believe that the child is in need of special education or related services. However, the district should have current medical information in order to make needed accommodations to the student's program.

   This requirement is consistent with the *Mitts* decision issued by the Oregon State Board of Nursing. Any child presenting health needs must be assessed by a qualified nurse who must then develop appropriate protocols.

b. The district must establish policies and procedures for evaluation and placement which assure that tests and other evaluation materials:

   - Have been validated and are administered by trained personnel

- Are tailored to assess educational need and are not merely based on IQ scores

- Reflect aptitude or achievement or whatever else the tests purport to measure and do not reflect the student's impaired sensory, manual or speaking skills (unless the test is designed to measure these particular deficits).

34 CFR § 104.35(b)

NOTE: There is no right to an independent evaluation under Section 504.

3. Placement Procedures

Like the EHA, in interpreting evaluation data and making placement decisions, the district must:

a. Draw upon information from a variety of sources

b. Assure that all information is documented and considered

c. Ensure that the placement decision is made by a group of persons including those who are knowledgeable about the child, the meaning of the evaluation data and placement options

d. Ensure that the student is educated with his/her nonhandicapped peers to the maximum extent appropriate.

34 CFR § 104.35(c)

4. Reevaluations

Section 504 requires "periodic" reevaluations. Unlike the EHA, there is no specified time frame. However, school districts will be in compliance if they reevaluate the student every three years. Additionally, Section 504 requires a reevaluation before any significant change in placement. *34 CFR § 104.35(d)*

Examples of significant changes in placement which require reevaluation:

- Expulsion
- Serial suspensions which exceed 10 days in a school year in many circumstances (See *10/24/88 OCR memo—EHLR DEC 307:05* in the Appendix; consideration given to the frequency of suspensions, the length of each and their proximity to one another.)
- Individual suspensions which exceed seven calendar days
- Transferring a student to home instruction
- Graduation from high school
- Significantly changing the composition of the student's class (e.g., moving the student from regular education to the resource room)

5. Least Restrictive Environment

Like the EHA, to the maximum extent appropriate, districts must educate handicapped students with nonhandicapped students. In order to remove a child from the regular educational environment, the district must *demonstrate* that education of the student in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. *34 CFR § 104.34*

6. Nonacademic Services

Districts must provide equal opportunity in areas such as counseling, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs, referrals to other agencies and employment. *34 CFR § 104.37*

a. *Counseling*: Districts may not counsel students with handicapping conditions toward more restrictive career objectives. *34 CFR § 104.37(b)*

b. *Physical education and athletics*: A district must provide an equal opportunity for students with disabilities to participate. A district may offer these activities separately for handicapped students only if necessary and the district may not deny a handicapped student the opportunity to compete in activities which are not separate. *34 CFR § 104.37(c)*

May the district use EHA money to serve children found handicapped under Section 504 but not EHA?

No. However, the district may use EHA B moneys to evaluate the child if the school district believes that the child may also be eligible for special education. Moreover, if a student's addiction results in an EHA handicapping condition (for example, the child becomes seriously emotionally disturbed) EHA moneys may then be used to serve the child. *211 EHLR DEC. 431 (OSEP 1986)*

Special Issues Regarding Students Addicted to Drugs or Alcohol

If the district suspects that a student has an alcohol or drug problem, what should it do?

If a district suspects that the drug or alcohol problem may be substantially limiting a major life activity, such as learning, the district is obligated to seek an evaluation at district expense. Although Section 504 does not require consent before evaluations, it is a good practice to secure written consent. If the evaluation verifies the existence of a handicapping condition which substantially limits a major life activity, the student is considered handicapped under Section 504.

The district must then convene a group of people knowledgeable about the child, capable of interpreting the data, and familiar with placement options. The team must then design an educational program to meet the student's individual needs and give notice to the student's parent or guardian of their rights under Section 504. The district must periodically reevaluate the student and may not make a significant change in the student's placement without providing the parent or guardian with notice and conducting a reevaluation.

NOTE: The Appendix includes an Oregon due process hearing decision on Section 504 and its implications for students addicted to alcohol. This decision fleshes out some of the requirements and illustrates what can happen if a district is not fully aware of its obligations.

What if such a student is caught with drugs at school?

A school district is entitled to enforce its rules prohibiting the use, sale or possession of drugs or alcohol by drug- or alcohol-addicted students, provided that the rules are enforced evenly with respect to all students. *Comment to 34 CFR § 104.3(j)* Although using drugs at school is related to a drug addicted student's handicapping condition, the school district may still use its normal disciplinary policies, including expulsion, so long as permitted under the district's policies, provided that the district follows proper procedures.

If the student is only protected by Section 504 (and is not EHA eligible) the district does not have to afford the student his/her federal due process rights. *29 USC 706(8) (C) (iv)* This is a notable exception to the general prohibition under Section 504 and the EHA to expelling a student for behavior related to his/her handicapping condition. However, if the student is also eligible under the EHA (e.g., the student has a learning disability and is drug addicted), the district must evaluate the relationship between the behavior and the handicapping condition and afford the student his/her due process rights. In all cases of expulsion, under state law the district must offer the student a hearing to rebut the charges as provided by OAR 581-21-070. Additionally, the district must offer the parent at least two alternative education programs which are appropriate and accessible to the student. *OAR 581-21-071*

NOTE: The Appendix includes an Office for Civil Rights memo on suspension and expulsion of students with disabilities.

Special Considerations for Students Having AIDS or HIV Infection

Students with Acquired Immune Deficiency Syndrome (AIDS), AIDS-Related Complex (ARC) or otherwise infected with Human Immunodeficiency Virus (HIV-infected) are individuals with handicaps under Section 504. They either qualify as actually having a physical impairment which substantially limits a major life activity or are regarded as having such a handicapping condition. Depending on the nature of the disease and the student's other conditions, the student may also qualify under the EHA.

Placement of the student must be made by a group of persons knowledgeable about the child, the meaning of the evaluation and medical information, and placement options. A public health representative should be on the team. Unless currently presenting a risk of contagion due to the stage of the disease (e.g., a contagious opportunistic infection, open lesions that cannot be covered) or parents and school agree on an alternative, a child with AIDS should remain in the regular classroom.

NOTE: The Oregon Health Division has published guidelines for schools regarding students who have Hepatitis B or AIDS.

Program Accessibility

What is a district's responsibility to make buildings accessible?

Facilities which were constructed prior to June 3, 1977 need not necessarily be made accessible so long as the program or activity, viewed in its entirety, is readily accessible to persons with disabilities. *34 CFR § 104.22* It would not be necessary to make every high school in a district accessible. However, the student must be afforded an equal opportunity to enjoy the full range of services offered by the district. For example, if a district runs a magnet school with specialized studies, students may not be denied access to the program merely because of accessibility problems. It would not be discriminatory, however, if a district contracts with a private alternative education program that cannot accept students needing special education because of the lack of a qualified teacher so long as the district is able to afford special education students a comparable program elsewhere.

Short of major modifications, what can a district do?

A district can redesign equipment, reassign classes or other services to accessible buildings, assign aides to students, deliver services at alternate accessible sites, or alter existing facilities. So long as there are other methods which are as effective in achieving compliance, a district need not undertake structural changes to a building. *34 CFR § 104.22(b)*

What are some examples of what is not an acceptable accommodation?

Carrying a student upstairs; in a larger district, making one particular building or part of a building accessible and placing all students with mobility impairments at this location *(Comment to 34 CFR § 104.22)*; having handicapped students eat on a separate floor due to an inaccessible cafeteria; denying certain programs such as music, art or assembly because these programs are inaccessible.

What is the district's obligation for new buildings or additions?

Buildings or additions constructed since June 3, 1977 must be designed and constructed to allow handicapped persons the ability to access and use them readily. *34 CFR § 104.23(a)* For example, multilevel buildings should have ramps or elevators, accessible bathrooms, doorways constructed wide enough to fit wheelchairs, etc. Contractors should be familiar with accessibility requirements.

What is a district's obligation when a building is altered?

To the maximum extent feasible, all facilities which are altered after June 3, 1977 must be altered to allow accessibility and usability by persons with disabilities. *34 CFR § 104.23(b)* For example, if a school district adds on a wing to a building, the wing must be made accessible. Or, if a storage room is modified into a classroom, modifications, such as widening the doorway, must be made.

What is meant by the phrase "to the maximum extent feasible"?

This provision covers the occasional instance where the nature of an existing facility is such as to make it impractical or prohibitively expensive to renovate in a manner that results in its being entirely barrier-free. However, in all of these instances, the alteration should provide the maximum amount of physical accessibility that is feasible. *Comment to 34 CFR § 104.23(b)*

Who should a district call regarding technical assistance on accessibility issues?

The U.S. Department of Education's Office for Civil Rights can provide technical assistance to districts on how to fulfill the requirements of Section 504. They may be reached by calling (206) 442-1930.

Employment Practices

For purposes of employment, who is a qualified individual with handicaps?

A qualified individual with handicaps is one, who with reasonable accommodation, can perform the essential functions of the job in question. *34 CFR § 104.3(k)(1)*

What are a district's responsibilities for hiring persons with disabilities?

School districts, because they receive federal financial assistance under the EHA, are required to take positive steps to employ and advance qualified individuals with handicaps. *34 CFR § 104.11(a)(2)*

Districts must make reasonable accommodations to the known physical or mental limitations of an otherwise qualified applicant or employee who has a handicapping condition unless the accommodation would impose an undue hardship on the operation of the district's program. *34 CFR § 104.12(a)*

What is considered an "undue hardship"?

The regulation lists the following factors which should be considered:

1. The overall size of the district's program with respect to the number of employees, number and type of facilities, and size of budget
2. The type of the district's operation, including the composition and structure of its workforce
3. The nature and cost of the accommodation needed.

34 CFR § 104.12(c)

What are reasonable accommodations?

Some examples of reasonable accommodations are:

1. Making facilities readily accessible to and usable by persons with disabilities
2. Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters.

34 CFR § 104.12(b)

When may a district refuse to hire an applicant or promote an employee who has a disability?

When the person is not qualified, where reasonable accommodation does not overcome the effects of the person's handicap, or where reasonable accommodation causes undue hardship to the employer. *Comment to 34 CFR § 104.12*

Is the district prohibited from asking applicants about any handicapping conditions s/he may have?

Generally, an employer covered by Section 504 may not conduct a preemployment medical examination or make preemployment inquiries as to whether an applicant has a handicapping condition. However, the employer may inquire into an applicant's ability to perform job-related functions. For example, an employer may not ask an applicant if s/he has epilepsy but may ask whether s/he can perform a particular job without endangering other employees.

If the employer is attempting to rectify past discrimination or taking voluntary action to overcome limited participation in its workforce, the employer may invite, but may not require, applicants to indicate to what extent they are handicapped. In such instances, the employer must be clear that such information is voluntary and is intended solely to meet the employer's affirmative action or other obligation. *34 CFR § 104.14*

Are medical examinations totally prohibited?

An employer may condition employment on the results of a medical examination only if all applicants, regardless of handicap, are also subject to such an examination and if the results are kept confidential. *34 CFR § 104.14*

What limitations are there on an employer regarding testing applicants?

A test which tends to screen out persons with disabilities may not be used unless the test score is shown to be job related and alternative job related tests which do not screen out persons with disabilities are not available. Tests must also be administered in a manner that reflect actual aptitude or skill rather than the sensory, manual or speaking impairment of the applicant unless the test purports to test these skills. *34 CFR § 104.13*

Is an employer allowed to provide differences in fringe benefits or contributions for persons with disabilities if justified on an actuarial basis?

No. Such a suggestion was rejected by the U.S. Department of Education when the regulations were adopted.

34 CFR § 104.11 and Comment

What is an employer's obligation to hire or retain a person who is addicted to alcohol or drugs?

An employer subject to Section 504 may not refuse employment to someone who has been addicted to drugs or alcohol in the past. If an applicant or employee is presently addicted to alcohol, the employer may not refuse or terminate employment unless the employer can show that the alcohol addiction prevents successful performance on the job or presents a direct threat to property or the safety of others. The employer may hold the addicted person to the same standards of performance and behavior as expected of others. The behavioral manifestations of the condition may be taken into account in determining whether s/he is qualified. An employer is not required to retain or hire an individual addicted to drugs who is currently using drugs. *29 USC 706(8) (C) (v); Comment to 34 CFR 104.3(j)*

Is an employer entitled to administer drug testing to persons known to have been addicted in the past?

Recent amendments to Section 504 clarify that an employer is not prohibited from requiring an employee to be drug tested who has successfully completed or is presently participating in a supervised drug rehabilitation program. *29 USC 706(8)(C)(ii)*

NOTE: Employment issues are very technical and districts are encouraged to contact their attorneys for more guidance in this area.

Major Differences Between The EHA and Section 504

	The EHA	Section 504
Who is Protected	Lists 11 categories of qualifying conditions.	Much broader. A student is eligible so long as s/he meets the definition of qualified handicapped person; i.e., has or has had a physical or mental impairment which substantially limits a major life activity, or is regarded as handicapped by others.
Duty to Provide a Free Appropriate Education	Both require the provision of a free appropriate education to students covered under them including individually designed instruction.	
	Requires the district to provide IEPs. "Appropriate education" means a program designed to provide "educational benefit."	"Appropriate" means an education comparable to the education provided to nonhandicapped students.
Special Education vs. Regular Education	A student is only eligible to receive EHA services if the multidisciplinary team determines that the student has one of the 11 handicapping conditions and needs special education.	A student is eligible so long as s/he meets the definition of qualified handicapped person; i.e., has or has had a physical or mental impairment which substantially limits a major life activity, or is regarded as handicapped by others. The student is not required to need special education in order to be protected.
Funding	If a student is eligible under the EHA, the district receives additional funding.	Additional funds are not provided.
Accessibility	Not specifically mentioned although if modifications must be made to provide a free appropriate education to a student, the EHA requires it.	Detailed regulations regarding building and program accessibility.

	The EHA	Section 504
Procedural Safeguards	Both require notice to the parent or guardian with respect to identification, evaluation and placement.	
	Requires written notice.	Does not require written notice but a district would be wise to do so.
	Notice provisions are much more comprehensive. What the notice at a minimum must provide, is specifically spelled out.	
	Written notice is required prior to *any* change in placement.	Notice is required only before a "significant change in placement."
Evaluations	The regulations are very similar.	
	Consent is required before an initial evaluation is conducted.	Only notice, not consent, is required.
	Reevaluations must be conducted at least every 3 years.	Requires periodic reevaluations.
	Not required.	Reevaluation is required before a signficant change in placement.
	Provides for independent evaluations.	Not required.
Grievance Procedure	The EHA does not require a grievance procedure nor a compliance officer.	Districts with more than 15 employees must designate an employee to be responsible for assuring district compliance with Section 504 and provide a grievance procedure for parents, students and employees.

	The EHA	Section 504
Due Process Hearings	Both require districts to provide impartial hearings for parents or guardians who disagree with the identification, evaluation or placement of a student with disabilities. (See grievance procedure requirement.) The rules are virtually identical.	
	OAR 581-15-081 governs hearings.	OAR 581-15-109 governs hearings.
Exhaustion	The parent or guardian must pursue the administrative hearing before seeking redress in the courts.	No exhaustion requirement.
Enforcement	Not enforced by OCR. Compliance is monitored by the Oregon Department of Education.	Enforced by the Office for Civil Rights.
	Both statutes provide for due process hearings.	
	The Department of Education will resolve complaints under either statute under OAR 581-01-010.	
Employment	No provision.	Employment of persons with disabilities is regulated.

NOTE: In the Appendix is a memorandum from OCR discussing the differences between the EHA and Section 504 with illustrative examples.

Appendix A

Sample

PARENT/STUDENT RIGHTS IN IDENTIFICATION, EVALUATION AND PLACEMENT

Please Keep This Explanation for Future Reference

(Section 504 of the Rehabilitation Act of 1973)

The following is a description of the rights granted by federal law to students with handicaps.* The intent of the law is to keep you fully informed concerning decisions about your child and to inform you of your rights if you disagree with any of these decisions.

You have the right to:

1. Have your child take part in, and receive benefits from public education programs without discrimination because of his/her handicapping condition;

2. Have the school district advise you of your rights under federal law;

3. Receive notice with respect to identification, evaluation, or placement of your child;

4. Have your child receive a free appropriate public education. This includes the right to be educated with nonhandicapped students to the maximum extent appropriate. It also includes the right to have the school district make reasonable accommodations to allow your child an equal opportunity to participate in school and school-related activities.

5. Have your child educated in facilities and receive services comparable to those provided nonhandicapped students;

6. Have your child receive special education and related services if s/he is found to be eligible under the Education of the Handicapped Act (PL 94-142) or Section 504 of the Rehabilitation Act;

7. Have evaluation, educational, and placement decisions made based upon a variety of information sources, and by persons who know the student, the evaluation data, and placement options;

8. Have transportation provided to and from an alternative placement setting at no greater cost to you than would be incurred if the student were placed in a program operated by the district;

(29 U.S.C. 706(7), §794; 34 C.F.R. Part 104, 20 U.S.C. §1232g; 34 C.F.R. Part 99)

9. Have your child be given an equal opportunity to participate in nonacademic and extracurricular activities offered by the district;

10. Examine all relevant records relating to decisions regarding your child's identification, evaluation, educational program, and placement;

11. Obtain copies of educational records at a reasonable cost unless the fee would effectively deny you access to the records;

12. A response from the school district to reasonable requests for explanations and interpretations of your child's records;

13. Request amendment of your child's educational records if there is reasonable cause to believe that they are inaccurate, misleading or otherwise in violation of the privacy rights of your child. If the school district refuses this request for amendment, it shall notify you within a reasonable time, and advise you of the right to a hearing;

14. Request mediation or an impartial due process hearing related to decisions or actions regarding your child's identification, evaluation, educational program or placement. You and the student may take part in the hearing and have an attorney represent you. Hearing requests must be made to the State Superintendent of Public Instruction, Oregon Department of Education, 700 Pringle Parkway SE, Salem, Oregon 97310-0290, pursuant to OAR 581-15-109;

15. Ask for payment of reasonable attorney fees if you are successful on your claim;

16. File a local grievance.

The person in this district who is responsible for assuring that the district complies with Section 504 is _____

Telephone number _____.

OCR SENIOR STAFF MEMORANDA

MEMORANDUM

TO: OCR Senior Staff

FROM: LeGree S. Daniels, Assistant Secretary for Civil Rights

SUBJECT: Distinctions Between Section 504 and the Education of the Handicapped Act

DATE: October 24, 1988

A staff memo from the Office for Civil Rights (OCR) clarifies the distinctions between Section 504 and the EHA, focusing on the definition of handicapped persons, method of determining compliance, and evaluation and due process requirements. According to the memo, compliance with the EHA does not necessarily ensure compliance with Section 504. For example, Section 504's definition of a handicapped person is much broader than the EHA's. Districts may not limit the provision of educational services to students who have handicapping conditions recognized under the EHA. Any student who has a physical or mental impairment, is regarded as having such an impairment, or who has a record of such impairment, that substantially limits a major life activity is a handicapped person covered by Section 504. Concerning the provision of a free appropriate public education, the implementation of an IEP that meets EHA standards will also meet the requirements of Section 504; however, implementation of an IEP that fails to meet the requirements of the EHA does not necessarily violate Section 504. Instead, OCR will look to see whether the services identified during the evaluation process are being provided to the child. In addition, standards for evaluation/reevaluation are different under the two laws. EHA requires districts to reevaluate handicapped children at least every three years, whereas Section 504 requires a reevaluation before any significant change in placement. Due process requirements also differ; for example, Section 504 contains no confidentiality requirement.

This memorandum provides clarification of the requirements concerning elementary and secondary education under Section 504 of the Rehabilitation Act of 1973 (Section 504) and Part B of the Education of the Handicapped Act (EHA). The Office for Civil Rights (OCR) has responsibility for enforcing Section 504, while the Office of Special Education and Rehabilitative Services (OSERS) has responsibility for the EHA. In any discussion of the two laws it is useful to bear in mind the respective origins and purposes of the statutes. The EHA, a grant statute, attaches many specific conditions to the receipt of Federal funds. Section 504, mandating nondiscrimination on the basis of handicap, is less specific. The regulations implementing Section 504 and the EHA have significant similarities and differences, a few of which are addressed in this memorandum.

Subpart D of the Section 504 regulation (34 C.F.R. Part 104) and of Appendix A — Analysis of Final Regulation — indicate ways in which Section 504 and the EHA intersect. Three sections of the Section 504 regulation (Secs. 104.33(b)(2), 104.35(d), and 104.36) state that *one* means for recipients to comply with Section 504 with respect to those sections, is to comply with the EHA. OCR, therefore, sometimes must review recipients' activities in light of the EHA, making a thorough familiarity with the EHA essential. Consistency with the standard enunciated in the EHA in these specified areas is *compliance* with Section 504.

Since consistency with the EHA is only one means of complying with these three provisions of the Section 504 regulation, however, *noncompliance* determinations cannot rest solely on a conclusion that a recipient has not met the standards of the EHA. While a recipient may comply with these three sections of the Section 504 regulation by complying with the EHA, failure to meet the EHA standard does not necessarily constitute a violation of Section 504, and must not be the basis for OCR's analytic approach or conclusions.

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When a state announces that it will fulfill the requirements of Section 504 by carrying out EHA requirements, OCR may not find a Section 504 violation based on failure to comply with the EHA. OCR lacks authority to adopt standards of another statute in an effort to simplify its investigations. Moreover, OCR should never appear to provide an official interpretation of the EHA and its implementing regulation, nor imply that it makes findings of compliance or noncompliance under the EHA. In all cases, OCR must make an independent determination with respect to compliance with Section 504. In the interest of consistency in the interpretation of Section 504 and the EHA, the EHA regulations and case law may provide guidance on the reasonable interpretation of Section 504. However, there is no simple rule for when and how to apply EHA case law to specific issues. As in the application of Title VII case law, in some instances, analogies may be drawn, depending on judicial reasoning, statutory language, and legislative intent. Discussed below are a few examples of fact situations, drawn from actual OCR cases, that have presented difficulties.

For purposes of this memorandum, the reader can assume that, in all examples, the school districts receive EHA funds and have declared their intention to fulfill the relevant requirements of Section 504 by complying with the EHA.

DEFINITIONS/COVERAGE

Coverage of the two statutes and their respective implementing regulations is couched in different terms. Section 504 applies to all qualified handicapped persons in federally funded programs and activities. In contrast, the EHA applies only to children having impairments specified in the statute and regulation "who because of those impairments need special education and related services." (34 C.F.R. Sec. 300.5.) Appendix A to the Section 504 regulation contains indications of an intent to make the two laws consistent, for example, by adopting the EHA definition of "specific learning disabilities." While the resultant coverage may, in many cases, be similar, the analytical approach is different. OCR's approach must always be that of the Section 504 regulation.

The Section 504 regulation at Sec. 104.3(j) specifies:

> (1) "Handicapped persons" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment . . . .
>
> (2)(ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

Example 1

Facts: A student has been identified as addicted to drugs, a handicap under the Section 504 regulation. No other handicapping condition has been identified that would require special education services that would trigger eligibility for services under the EHA. The student is truant from school, and most of his teachers believe that his educational needs are not being met and that the truancy is caused by his handicap. However, the school district limits its provision of services to individuals who would be eligible for special education under the EHA, has a blanket policy of not considering drug or alcohol addiction to be a physical or mental impairment, and refuses to evaluate the student.

Analysis: OCR's analysis is not tied to the child's ineligibility for special education services under the EHA. Section 504 coverage in some instances will be narrower and in other instances will be broader than that of the EHA. While eligibility for special education virtually always is an indication that a child is handicapped or believed to be handicapped, the converse is not always true. The critical consideration is that OCR must follow the Section 504 regulatory definitions. In this case, OCR would find a violation of Section 504 because the district may not limit its services to students who have handicapping conditions recognized under the EHA. The case offers an example of a situation in which a district might, at the same time, be in violation of Section 504 and in compliance with the EHA. This student has a handicap, as defined by the Section 504 regulation, so the school district must determine whether his educational needs are being met to the extent that the needs of nonhandicapped students are met. (This memorandum does not address what services are appropriate or what disciplinary actions may be taken with respect to drug use.)

Example 2

Facts: A student enrolled in the regular education program has juvenile rheumatoid arthritis, which requires periodic administration of medication during the school day. Without the medication, the child's ability to benefit from education is hampered. After completion of EHA procedures, the district determines the child is not in need of special education. Because, under EHA definitions, related aids and services may be limited to those necessary to enable a child to benefit from special education, the school district claims no obligation to assist the child with her medication.

Analysis: The child has a physical impairment that substantially limits a major life activity. Although not considered to

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be entitled to special education under the EHA, she would be a handicapped person covered by Section 504.

APPROPRIATE PUBLIC EDUCATION

The Section 504 regulation requires that recipients provide a free appropriate public education (FAPE) to qualified handicapped persons. The regulation at Sec. 104.33(b) states:

> (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of Secs. 104.34, 104.35, and 104.36.
>
> (2) Implementation of an individualized education program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i). . . .

Implementation of an individualized education program (IEP) that has been developed in accordance with the EHA meets the FAPE requirements of Section 504. However, implementation of an IEP document that fails to meet the requirements of the EHA does not necessarily violate Section 504 because Section 504 does not require the development of an IEP document. The content of an IEP document that does not meet the requirements of the EHA nevertheless may serve as important evidence of whether the requirements of Section 504 have been met.

OCR's analytical approach, therefore, does not track a recipient's alleged failure to have or implement correctly an IEP document. The approach is to determine whether a child's needs were determined on an individualized basis, whether the evaluation and placement procedures that were applied conformed with those specified in the Section 504 regulation, and whether the placement, aids, and services identified by the recipient through this process as necessary to meet the student's individual needs are being provided. Although the EHA regulation contains more detailed requirements for determining and recording the educational needs of and services to handicapped students, and a recipient has developed procedures for conforming with the EHA, OCR's analysis of Section 504 compliance is not coextensive with an analysis of the recipient's compliance with the parallel sections of the EHA regulation.

Example 3

Facts: On the basis of an appropriate evaluation that identified speech problems, a psychological disorder, and a specific learning disability, a recipient provides speech, reading, and psychological services. A month later, an IEP document is signed specifying the services that will be provided: three hours per week of speech therapy, one hour per week of psychological counseling, and five hours per week of special reading instruction. The child receives the reading and psychological services as specified, but receives only two hours per week of speech therapy.

Analysis: The recipient has violated the Section 504 regulation at Sec. 104.33(b). The violation is not that the recipient failed to fully implement the IEP document. The violation, under Section 504, is the failure to provide the services that the recipient identified, through the appropriate process, as necessary for that child. The recipient must make a determination of the child's needs for educational services and related aids, and the IEP document ordinarily is the source of evidence that an appropriate determination was made of those needs, meeting the individualization requirements of Sec. 104.33 and the evaluation and placement requirements of Secs. 104.34 and 104.35. This recipient has determined the needs appropriately but has not met those needs. OCR should not analyze the facts in terms of imperfections in or deviations from the IEP document. However, this does not mean that OCR makes an independent judgment of the child's needs; nor does it mean that OCR substitutes its judgment for the recipient's in determining need. Further, Section 504 does not require that an IEP document be in place before the appropriately determined services are provided, even though the EHA regulation requires that the IEP be in effect prior to provision of services. (Sec. 300.342.) The required process is the one prescribed by the Section 504 regulation at Secs. 104.34 - 104.36.

Example 4

Facts: A handicapped child has an IEP that has not been signed by her parent or teacher and that has not been formally reviewed for 13 months. The EHA requires an annual IEP review, attended by a person qualified to supervise or provide special education other than the child's teacher, the child's teacher, and the child's parent. (34 C.F.R. Sec. 300.344.)

Analysis: The mere fact that the IEP document lacks certain signatures would not violate either the EHA nor Section 504. Absent further allegations, for example, that the educational services no longer meet the child's needs, or that there may be a pattern of unreasonable delays in evaluating and placing students, the fact that the IEP has not been reviewed in 13 months would not constitute a violation of Section 504. As in

all decisions made by OCR, reasonableness and the totality of the circumstances should be considered.

Example 5

Facts: A multiply handicapped child's IEP specifies that speech, language, and occupational services, and remedial mathematics will be provided. The IEP does not include annual long-term goals and short-term objectives or the number of minutes per week or days per week for speech and language services. However, the child receives speech, language, and occupational services, and remedial mathematics on a regular basis.

Analysis: These facts alone do not establish a violation of Section 504. In a case like this, when the information needed does not appear in the IEP document, OCR must look beyond the IEP document to determine whether the school district has identified the child's needs, described the necessary program somewhere, and provided services in amounts that the district has determined are necessary, according to the process requirements of the Section 504 regulation. The Section 504 regulation at Sec. 104.33, by implication, requires that needs and services be identified with sufficient specificity (not necessarily in the IEP document) to assure OCR that the child's needs have been decided on an individual basis. Further, the procedural provisions at Sec. 104.36 require that parents have notice (not necessarily in writing) of actions regarding their child's evaluation, placement, and services. However, the facts should not be analyzed in terms of the detail and completeness of the IEP document, according to standards specified in the EHA regulation, as Section 504 does not require development of an IEP document. While the content of the IEP document is the most important piece of evidence, if the information is not there, OCR must go further to determine whether the decisions regarding the amount of time necessary for each service were made at all, and, if so, if they were made properly through the evaluation process. Note that this does not mean that the recipient must meet a need identified by an individual participant in an IEP meeting; nor does it mean that OCR makes an independent determination of services needed. The conclusion of the IEP committee ordinarily indicates the recipient's determination of the child's needs.

EVALUATION/REEVALUATION

The EHA regulation is more specific than the Section 504 regulation about the evaluation process. The EHA regulation requires that children be reevaluated "every three years or more frequently if conditions warrant or if the child's parent or teacher requests an evaluation." (Sec. 300.534.) In contrast, Section 504 requires evaluation of any child believed to need special education before initial placement and any significant change in placement. (Sec. 104.35(a).) Further, it requires "periodic reevaluation," adding that a reevaluation procedure consistent with the EHA is one means of meeting this requirement. (Sec. 104.35(d).)

Example 6

Facts: A student remains in a placement for three years and one month without a full reevaluation, although reevaluations are conducted in specific areas, as necessary, and services in those areas are altered in response to apparent needs. The EHA requires that handicapped children in special education be reevaluated every three years, and the State Plan under Part B of the EHA specifies that handicapped children will be reevaluated every three years.

Analysis: Even though the recipient has made known its intention to meet the requirements of the EHA, and the EHA requires reevaluation every three years, the failure to conduct a reevaluation after three years and one month does not automatically violate Section 504. The Section 504 regulation requires "periodic reevaluations." The state's adoption of the EHA three-year standard is evidence that the state considers three years to be the appropriate standard for "periodic reevaluations." However, OCR's analysis should not be in terms of deviations from the EHA standard; it should be in terms of a failure to evaluate students periodically, the Section 504 standard.

Example 7

Facts: A child is evaluated, identified as trainable mentally retarded, and placed in a self-contained classroom in a regular public school. The child's IEP calls for interaction with nonhandicapped children at lunch and music. In accordance with new IEPs, developed by appropriately knowledgeable persons, but without benefit of reevaluation, the next year all trainable mentally retarded children from that program are placed in a separate school for handicapped children only. The state permits a change in placement based on an evaluation that is one- to three-years old.

Analysis: Although no attempt is made here to define a "significant" change in placement, a change from placement in a regular public school with contact with nonhandicapped children to a school for handicapped children only is plainly significant. The recipient in this case has violated Section 504 by making a significant change in the child's placement without reevaluating her. Moreover, the fact that placements of *all* trainable mentally retarded students are changed is some indication that placement decisions were not made on an individual basis. The fact that the new placement is contained in an IEP document that meets the state's specific

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procedural requirements for the EHA does not ensure compliance with Section 504 evaluation requirements.

DUE PROCESS

The Section 504 regulation at Sec. 104.36 requires that recipients provide procedural safeguards regarding identification, evaluation, and placement of persons who, because of handicap, need or are believed to need special instruction or related services. This requires examining official policies and procedures, as well as the application of the policies and procedures to individual students. The only procedural safeguards specified in Subpart D of the Section 504 regulation are provided at 34 C.F.R. Sec. 104.36:

> [N]otice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

Although compliance with EHA procedural safeguards is one way to comply with procedural requirements of Section 504, deviations from procedural safeguards specified at Subpart E of the EHA regulation do not necessarily equate with violations of Section 504, even if the recipient specifies that it intends to comply with Section 504 by complying with the procedural requirements of the EHA. Under Section 504, due process procedures must meet the standard quoted above. Parents must have notice (not necessarily in writing) of actions regarding the identification, evaluation, and placement of their children. Parents also must have a right to an impartial hearing regarding their child's evaluation or placement. They must have an opportunity to examine relevant records and to be represented by counsel at the hearing. A procedure must be available for a higher level review of the hearing decision.

OCR should evaluate the procedures offered in a particular case to determine whether they meet these requirements. OCR would determine whether parents were notified of their due process rights, for example, when a recipient refused to evaluate their child, whether they were permitted to examine records, whether the hearing officer was impartial, whether the parents were permitted counsel, and whether an impartial review process was provided.

Example 8

Facts: A parent requests access to her son's records, and a staff member gives her a report containing the names and confidential information about other children. Subpart E of the EHA regulation requires that participating agencies protect the confidentiality of personally identifiable information. (Sec. 300.572.)

Analysis: The Section 504 regulation contains no confidentiality requirement. It is immaterial that the recipient states that it will comply with Section 504 by complying with the procedural requirements of the EHA. Allegations of breach of confidentiality should be referred to OSERS and to the Family Educational Rights and Privacy Act Office in the Department of Education.

CONCLUSION

In sum, compliance with Section 504 must be determined on the basis of an analysis of the facts in accordance with standards contained in the Section 504 regulation. While compliance with certain provisions of the EHA is one way to comply with Section 504, noncompliance with the EHA is not automatically noncompliance with Section 504. Nor is compliance with the EHA automatic compliance with Section 504, except for those three sections mentioned specifically in the Section 504 regulation. Under no circumstances should OCR imply that it provides an official interpretation of the EHA or that it makes findings under the EHA.

MEMORANDUM

TO: OCR Senior Staff

FROM: LeGree S. Daniels, Assistant Secretary for Civil Rights

SUBJECT: Long-term Suspension or Expulsion of Handicapped Students

DATE: October 28, 1988

A staff memo from the Office for Civil Rights (OCR) provides guidance on the application of Section 504 to the suspension and expulsion of handicapped students. The memo cites the Supreme Court's decision in *Honig v. Doe*, 108 S.Ct. 592 (1988), as being consistent with Section 504's requirement that districts cannot make a significant change in a handicapped child's placement without reevaluating the child and affording due process procedures, and OCR's policy of applying these requirements to the suspension and expulsion of handicapped students. According to OCR policy, a suspension/expulsion of a handicapped student for more than 10 consecutive school days constitutes a

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"significant change in placement" which triggers due process procedures. A series of shorter suspensions may also constitute a "significant change in placement," if the suspensions create a pattern of exclusions used to circumvent the *Honig* standard. Prior to making a significant change in placement, districts must conduct an evaluation to determine whether the misconduct is caused by the child's handicapping condition. If the misconduct is caused by the child's handicap, the district may not suspend or expel the child. If the misconduct is found to be unrelated to the child's handicap, the district may exclude the child and cease all educational services. OCR will allow one exception to these requirements; that is, students who are handicapped solely because of addiction to drugs or alcohol may be expelled with no reevaluation.

This memorandum provides guidance on the application of the Section 504 regulation at 34 C.F.R. Part 104 to the disciplinary suspension and expulsion of handicapped children from school,[1] an issue not addressed directly by the regulation. This guidance supersedes previous memoranda on this issue.

Legal Authority

The Section 504 regulation requires that a school district evaluate a handicapped child before making a significant change in his or her placement. Specifically, the regulation pertaining to evaluation and placement states:

> A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of . . . this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.

34 C.F.R. Sec. 104.35(a).

The Supreme Court's recent decision in *Honig v. Doe*, 108 S.Ct. 592 (1988), interpreted the Education of the Handicapped Act (EHA), rather than Section 504. Nevertheless, it lends support to OCR's regulatory provision that a recipient may not make a significant change in a handicapped child's placement without reevaluating the child and affording the due process procedures required by the Section 504 regulation at 34 C.F.R. Sec. 104.36. The decision also supports OCR's longstanding policy of applying the regulatory provision regarding "significant change in placement" to school disciplinary suspensions and expulsions of handicapped children.

OCR Policy

1. If a proposed exclusion of a handicapped child is permanent (expulsion) or for an indefinite period, or for more than 10 consecutive school days, the exclusion constitutes a "significant change in placement" under Sec. 104.35(a) of the Section 504 regulation.

2. If a series of suspensions that are each of 10 days or fewer in duration creates a pattern of exclusions that constitutes a "significant change in placement," the requirements of 34 C.F.R. Sec. 104.35(a) also would apply. The determination of whether a series of suspensions creates a pattern of exclusions that constitutes a significant change in placement must be made on a case-by-case basis. In no case, however, may serial short exclusions be used as a means to avoid the Supreme Court's prohibition of suspensions of 10 days or longer. An example of a pattern of short exclusions that would clearly amount to a significant change in placement would be where a child is suspended several times during a school year for eight or nine days at a time. On the other other hand, OCR will not consider a series of suspensions that, in the aggregate, are for 10 days or fewer to be a significant change in placement. Among the factors that should be considered in determining whether a series of suspensions has resulted in a "significant change in placement" are the length of each suspension, the proximity of the suspensions to one another, and the total amount of time the child is excluded from school.

3. In order to implement an exclusion that constitutes a "significant change in placement," a recipient must first conduct a reevaluation of the child, in accordance with 34 C.F.R. Sec. 104.35.

4. As a first step in this reevaluation, the recipient must determine, using appropriate evaluation procedures that conform with the Section 504 regulation, whether the misconduct is caused by the child's handicapping condition.

5. If it is determined that the handicapped child's misconduct *is* caused by the child's handicapping condition, the evaluation team must continue the

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[1] This memorandum addresses only the requirements under the Section 504 regulation. Requirements of the Education of the Handicapped Act may be different in some respects.

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evaluation, following the requirements of Sec. 104.35 for evaluation and placement, to determine whether the child's current educational placement is appropriate.

6. If it is determined that the misconduct is *not* caused by the child's handicap, the child may be excluded from school in the same manner as similarly situated nonhandicapped children are excluded. In such a situation, all educational services to the child may cease.[2]

7. When the placement of a handicapped child is changed for disciplinary reasons, the child and his or her parent or guardian are entitled to the procedural protections required by Sec. 104.36 of the Section 504 regulation; that is, they are entitled to a system of procedural safeguards that includes notice, an opportunity for the examination of records, an impartial hearing (with participation of parents and opportunity for counsel), and a review procedure. Thus, if after reevaluation in accordance with 34 C.F.R. Sec. 104.35, the parents disagree with the determination regarding relatedness of the behavior to the handicap, or with the subsequent placement proposal (in those cases where the behavior is determined to be caused by the handicap), they may request a due process hearing.

Note that these procedures need not be followed for students who are handicapped solely by virtue of being alcoholics or drug addicts with regard to offenses against school disciplinary rules as to the use and possession of drugs and alcohol. Appendix A Para. 4 to the Section 504 regulation states:

> Of great concern to many commenters was the question of what effect the inclusion of drug addicts and alcoholics as handicapped persons would have on school disciplinary rules prohibiting the use or possession of drugs or alcohol by students. Neither such rules nor their application to drug addicts or alcoholics is prohibited by this regulation, provided that the rules are enforced evenly with respect to all students.

For example, if a student is handicapped solely by virtue of being addicted to drugs or alcohol, and the student breaks a school rule that no drugs are allowed on school property, and the penalty as to all students for breaking that rule is expulsion, the handicapped student may be expelled with no requirement for a reevaluation. This exception, however, does not apply to children who are handicapped because of drug or alcohol addiction and, in addition, have some other handicapping condition. For children in that situation, all the procedures of this policy document will apply.

Further, this policy does not prevent a school from using its normal reasonable procedures, short of a change in placement, for dealing with children who are endangering themselves or others. Where a child presents an immediate threat to the safety of others, officials may promptly adjust the placement or suspend him or her for up to 10 school days, in accordance with rules that are applied evenhandedly to all children.

If you have any questions about the contents of this memorandum, feel free to call me or have a member of your staff contact Jean Peelen at 732-1641.

MEMORANDUM

TO: Jesse L. High
Regional Civil Rights Director
Region IV

FROM: LeGree S. Daniels, Assistant Secretary
for Civil Rights

SUBJECT: Request for Assistance, Muscogee County School District, Georgia

DATE: February 24, 1989

A memorandum from the Office for Civil Rights (OCR) addressed the issue of whether a handicapped student may be suspended after a determination that the student's misconduct is a result of his/her handicapping condition. According to the memo, a district may be justified in suspending a handicapped student, even after the district has determined that the student's misconduct is caused by his/her handicapping condition in two instances: genuine emergencies, and when the district is meeting to revise the IEP in order to deal with the discipline problem. In determining the number of days of exclusion in a particular school year, OCR will not count days of exclusion in a previous school year; however, in determining whether a series of

[2] The provision of this policy which permits total exclusion of handicapped children from educational services should not be applied in Alabama, Georgia, Florida, Texas, Louisiana, and Mississippi. In *S-1 v. Turlington*, 635 F.2d 342, 348 (5th Cir. Unit B 1981), the court of appeals ruled that under both Section 504 and the EHA, a handicapped child may be expelled for disruptive behavior that has been properly determined not to have been caused by the handicapping condition, but educational services may not be terminated completely during the expulsion period.

> suspensions creates a pattern of exclusions that constitutes a significant change of placement, OCR may consider other relevant facts, such as the pattern of exclusions in the previous school year, the evaluation, and the IEP.

By memorandum of December 22, 1988, to Frederick T. Cioffi, you requested assistance in responding to a letter dated September 23, 1988, from [ ] of the Georgia Advocacy Office. In her letter, [ ] wrote of her concerns about the suspension from school of a handicapped child where the school district had previously determined that the child's misbehavior was caused by his handicapping condition. This memorandum responds to the issues you raised, which you believe were not addressed in my October 28, 1988, memorandum to Office for Civil Rights (OCR) Senior Staff, entitled "Long-term Suspension or Expulsion of Handicapped Students" (hereinafter, "Discipline Policy"). I commend you for the thoughtful analysis of the issues that you provided in your memorandum.

BACKGROUND

The child in question was one of the subjects of your letter of findings (LOF) of June 8, 1988, resolving OCR Case No. 04-88-1124, filed against the Muscogee County School District (District). According to the LOF, in the 1987-88 school year, the District suspended the child from school for 51 days. Because this action, constituting a significant change in the child's placement, was taken without evaluating him, the District was found in violation of Section 504 of the Rehabilitation Act and its implementing regulation at 34 C.F.R. §104.35(a) (hereinafter, the "reevaluation requirement"). Because the action deprived the child of an appropriate education, the recipient was also found in violation of the regulatory provisions at 34 C.F.R. §§104.33(a), 104.33(b)(1) and 104.33(b)(2) (hereinafter, the "FAPE requirement"). To correct the violations, the recipient agreed to a remedial action plan committing the District to reevaluate the child to determine whether his misbehavior resulted from his handicapping condition. The District also agreed to convene a meeting of appropriate individuals to determine the education appropriate for the child.

FACTS

According to documents supplied with your memorandum, the District conducted an evaluation on April 26 and 28, 1988, around the time regional investigators were on site (contrary to [ ] assertion that it was conducted over the summer pursuant to the LOF). At that time, no determination was made whether the child's misconduct resulted from his handicapping condition. In accordance with the remedial action plan, an independent evaluation was conducted on July 21, 1988. The independent evaluator, Dr. [ ] proposed behavior management strategies and recommended that the child not be suspended from school, inasmuch as suspensions deprived him of structure needed in his life, and suspensions were a form of punishment that he could not comprehend.

After the independent evaluation was completed, the Placement Committee met. A new individual educational program (IEP) was developed for the 1988-89 school year and signed on July 27, 1988. The Placement Committee minutes state that a behavior management plan would begin September 1988, adding that "Parents, teacher and aides, as well as school psychologist (and others as appropriate) will meet bi-monthly to assist/improve [the child's] behavior." The minutes stress the importance of the school and family's working together to improve the child's behavior. The minutes state also that the committee agreed that the child could not comprehend the reasons for his erratic behavior. The IEP document contains goals and objectives to improve the child's behavior. In addition, however, an item on the IEP document is checked indicating that discipline procedures applied to the child will be according to District policy. We assume that those procedures dictate suspension for some violations of school rules.

According to [ ] in a telephone conversation with regional office staff on December 1, 1988, the child has been suspended for six days in the 1988-89 school year. In your memorandum of December 22, 1988, you state:

> [I]n light of the independent psychologist's report of July 21, 1988, which the District has not challenged . . . *any* suspension of this student . . . violates his right to an appropriate education.

This case presents two compliance issues: (1) whether the child was deprived of an appropriate education; and (2) whether the current school year must be regarded in isolation from events in the preceding school year in determining whether a series of short suspensions creates a pattern of exclusions that constitute a significant change in a child's placement.

Issue 1: Was the child deprived of an appropriate education?

A. Applicable OCR Regulations and Policy

The Section 504 regulation requires a school district to implement the educational program it has designed to meet needs it has identified (the FAPE requirement cited above). Except in extraordinary circumstances, OCR does not review educational decisions, so long as a school district complies with the "process" requirements of the Section 504 regulation (Appendix A Subpart D).

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OCR's Discipline Policy rests on the regulatory requirement that a handicapped child be reevaluated prior to a significant change in placement (the reevaluation requirement). It does not address the FAPE requirement, that is, whether a school district's determination that misbehavior is caused by a child's handicap places limitations on a district's right to apply its regular discipline policies to that child.

B. Applicable Caselaw

Federal caselaw on the suspension of handicapped students rests primarily on two premises: first, schools may not unilaterally exclude handicapped children for misbehavior caused by the handicapping condition; and, second, schools are not precluded from using temporary suspensions to cope with emergencies.

The Supreme Court's opinion in *Honig v. Doe*, 108 S. Ct. 592, 605 (1988), concerned an emotionally handicapped child, where the parties agreed that the misbehavior was caused by the handicapping condition. Interpreting the Education of the Handicapped Act (EHA), rather than Section 504, the Court held that school districts may unilaterally suspend handicapped children temporarily for up to 10 school days. Relying on the EHA regulation and the Court's decision in *Goss v. Lopez*, 419 U.S. 565, 574-76 (1975), the Court wrote that Congress sought to prevent permanent unilateral exclusion of disabled children, but "the power to impose fixed suspensions of short duration does not carry the potential for total exclusion that Congress found so objectionable." 108 S. Ct. at 605 n.8. At the same time, the Court noted that Congress explicitly intended that all disabled children would be educated, including children with serious emotional disturbances, regardless of the severity of the disability. *Id.* at 604.

No relevant post-*Honig* Federal cases have been identified. None of the caselaw up to and including *Honig* addresses the specific issue raised in this memorandum.

C. Discussion/Analysis

Had the IEP document or the minutes of the IEP meeting in this case stated explicitly that the child should not be suspended, we would have had an easier case. The District would have violated the FAPE requirement by suspending a child after having explicitly stated that such action was inappropriate.

The IEP document in this case did not contain such a specific provision, however. A Placement Committee does not consent by silence, implicitly agreeing to every item in an evaluator's report that it has not explicitly challenged. Although Dr. [ ] said that suspensions were inappropriate, and the Placement Committee agreed that the misbehavior was caused by the child's handicap, the Placement Committee neither accepted evrything in Dr. [ ] report nor said in so many words that suspensions were inappropriate. The IEP minutes state that Dr. [ ] report was considered, and that meets the regulatory requirement at §104.35(c).

OCR is, nevertheless, not precluded from determining whether the Placement Committee acted irrationally or arbitrarily. Such a determination would be made with great caution, in light of the "extraordinary circumstances" clause in the Appendix to the regulation cited above. The Placement Committee determined that the child was incapable of understanding the reasons for his erratic behavior. Without comment, the Committee checked an item specifying that the District's ordinary discipline policy and procedures would apply. It is, of course, possible that the Committee's act in checking off the item was unintentional. Assuming that it was intentional, under the circumstances in this case, you could find that this action of the Committee was so inconsistent with the Committee's conclusions as to the child's behavior expressed in the minutes and the text of the IEP that it was irrational. Moreover, applying basic principles of contract law, where provisions of a document are inconsistent, specific provisions supersede boilerplate. Thus, in this situation, the District's use of suspension as a regular disciplinary measure for this child would constitute a denial of FAPE.

We are not saying that, as a universal rule, a school district may not suspend any child once it has determined that misbehavior was caused by a handicapping condition. Even with persuasive facts such as those in this case — where the recipient has determined that the misbehavior is caused by the handicapping condition; the District has determined that the child does not comprehend the reasons for his misbehavior; and the District has specified the need for periodic meetings on behavioral matters — the rationale behind the caselaw would permit a District to suspend a child under some conditions. Suspension would be limited to two purposes: first, genuine emergencies; *and*, second, meeting to revise the child's educational program in order to deal with the misbehavior problem. We lack facts to determine whether this child was suspended as a result of emergency conditions (Two three-day suspensions *suggest* that ordinary District policies have been applied that probably permit suspensions for misbehavior of a less severe nature.) Further, we do not know whether the three-day periods were used to deal with the problem.

Issue 2: Must the current school year be regarded in isolation from events in the preceding school year in determining whether a series of short suspensions creates a pattern of exclusions that constitute a significant change in a child's placement?

While it is not necessary to answer the second question for purpose of your question, it seems useful to address this general issue. The guidance provided in the Discipline Policy

memorandum regarding serial suspensions remains OCR policy. OCR would not find a significant change in placement where a child has been suspended for 10 days or fewer in one school year. You will note that the memorandum reads:

> *Among the factors* that should be considered in determining whether a series of suspensions has resulted in a "significant change in placement" are the length of each suspension, the proximity of the suspensions to one another, and the total amount of time the child is excluded from school. (Emphasis added.)

The list of factors that should be considered is not exclusive. Thus, in determining whether a series of suspensions that are each of 10 days or fewer in duration creates a pattern of exclusions that constitutes a significant change in placement, you may consider any other relevant facts, such as the pattern of exclusions in the previous school year, the evaluation, and the IEP. However, you may not count days of exclusion in the previous school year in determining the number of days of exclusion in the current school year.

If you have questions about the content of this memorandum, you may call Frederick T. Cioffi or your staff may call Jean Peelen at FTS 732-1641.

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Cite as 1986-87 EHLR DEC. 508:371

Oregon **July 24, 1987**

Matter of Dale Shroyer

Counsel for Student: Jeanne Kincaid, Esq., Oregon Legal Services Corporation, 230 Northeast Second, Suite A, Hillsboro, OR 97124

Counsel for District: Nancy Hungerford, Esq., 5070 S.E. Weeks Court, Milwaukee, OR 97267

State Hearing Officer: Marva Graham

District refused to give alcoholic student credit for fall semester because he missed first twelve days of school. Decision was made despite guardian's notice to district staff that student's absence was caused by his problems with alcohol. Student attended school nonetheless and, without referral for evaluation or notice of rights under Section 504, was placed in regular education program and provided alcohol abuse counseling. Shortly thereafter he was suspended for six weeks and received no educational services. At that time he was apparently referred for testing and multidisciplinary team meeting was subsequently held. Team found student's alcohol dependency met criteria for handicap classification under Section 504 and proposed homebound program and alcohol abuse counseling, but did not develop IEP. Guardian requested hearing, contending placement was not least restrictive and that district was required to develop IEP. She also alleged that district violated Section 504 by failing to refer and evaluate student in timely manner, by denying student class credit, and by improperly suspending student without prior evaluation or team meeting. Local hearing officer found district violated Section 504 by failing to identify and evaluate student in timely manner and failing to notify guardian of procedural rights. He ordered district to implement plan to ensure compliance with notice provisions of Section 504, but ruled in district's favor on all other issues. Both district and guardian appealed.

In preliminary rulings, state hearing officer found regulations implementing Section 504 were valid interpretations of the statute and that there was sufficient connection between district's receipt of federal funds and student's educational services to warrant application of Section 504 protections in this case. She agreed that district violated Section 504 by failing to refer and evaluate student in timely manner. Moreover, she found district discriminated against student on basis of handicap by disallowing credit because of attendance problems associated with his alcoholism. Suspension constituted change of placement and therefore violated Section 504 because change was made without prior evaluation or team meeting. In addition, multidisciplinary team meeting did not meet federal requirements because it was not made up of persons knowledgeable about the child; meeting was attended only by district staff who had little first hand knowledge of student. Finally, district's failure to develop IEP did not violate Section 504, but proposed homebound placement failed to meet least restrictive requirements.

NATURE OF THE CASE

This is a review at the Superintendent of Public Instruction level of a local district due process hearing decision made by Hearings Officer Larry H. Mylnechuk on February 12, 1987. The hearing was brought under Section 504 of the Rehabilitation Act of 1973. At both the local hearing and at this state level review the School District was represented by attorney Nancy Hungerford and the student and his guardian, Nyla Linscott, were represented by attorney Jeanne Kincaid of Oregon Legal Services Corporation.

At the local hearing the parties jointly introduced exhibits 1-22 and presented stipulated facts and a list of seven stipulated issues. The Hearings Officer found that the District violated Section 504 when it failed to identify and evaluate student Dale Shroyer, an alcoholic, upon his enrollment in late September, 1986. The District has appealed this portion of the decision. The remaining six issues were decided in favor of the District. The guardian has appealed these six issues.

The local Hearings Officer declined to address two issues raised by the District in post-hearing briefing: (1) whether the regulations accompanying Section 504 impermissibly go beyond the meaning of the statute; and (2) whether Section 504 applies to this case because the District alleges no federal funds were used in the programs in which Dale Shroyer was involved. The decision was made at a prehearing conference to include these two "threshold" issues in the state review. At the state hearing on June 8, 1987, the business manager for the District, Joan Hay, and the Director of Special Education, Melvin G. ("Bud") Moore, testified as to receipt and use of federal funds by the District. A list of the federal funds was supplied and supplementary materials containing additional details were supplied following the hearing. These two threshold issues will be discussed before turning to the seven issues covered in the local due process hearing.

ISSUES

1. ARE THE REGULATIONS ADOPTED BY THE DEPARTMENT OF HEALTH AND HUMAN SERVICES PURSUANT TO SECTION 504 VALID?

The District argues that the regulations promulgated by the Department of Health and Human Services improperly extend the reach of Section 504 if they are read to require more than nondiscriminatory treatment for Dale Shroyer. The District's position is supported by a footnote in *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361 (1979):

> If these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of [section] 504. Instead, they would constitute an unauthorized extension of the obligations imposed by the statute. 442 U.S. at 410.

Despite this skeptical note from the *Davis* court, the regulations have been consistently used by the Supreme Court for guidance in interpreting Section 504. In a 1985 case in which the State of Tennessee was sued for limiting in-hospital care for Medicaid recipients, the Court, again in a footnote, discussed the regulations:

> . . . 1974 Amendments to the Act clarified the scope of Section 504 by making clear that those charged with administering the Act had substantial leeway to explore areas in which discrimination against the handicapped posed particularly significant problems and to devise regulations to prohibit such discrimination. *Alexander v. Choate*, 105 S.Ct. 712 (1985) at 721, n. 20.

In this reaffirmation of the importance of the regulations in interpreting the statute, the Court cites to the *Davis* case mentioned above. In view of the Supreme Court's reliance on the regulations and the affirmation of the leeway given to the agencies administering the Act, it is concluded that the regulations provide a valid guide for the interpretation of Section 504.

2. DOES SECTION 504 APPLY TO DALE SHROYER'S EDUCATION IN VIEW OF THE DISTRICT'S PATTERN OF RECEIPT AND USE OF FEDERAL FUNDS?

It is undisputed that Section 504 prohibits discrimination by a recipient of federal funds only in the program or activity that receives federal funds. The statute is said to be "program specific." The area that is unclear is what scope to give the term "program or activity." Little guidance is available from caselaw on this central issue as it should be interpreted in a public high school setting.

Testimony at the June 8th hearing presented by the District outlined the federal funds received by the District and the use of those funds. None of the programs in which Dale Shroyer was directly involved received federal funds. Those on the staff who dealt with Shroyer were paid from the District's general funds. General funds paid for the evaluation of the student at Cedar Hills Hospital. The District employee who administered a battery of tests as part of the student's evaluation was paid by general funds. Since Shroyer was not found to be handicapped under the definitions of that term in the Education for All Handicapped Children Act of 1975, the federal funds that come to the District under the EHA could not be used for his education.

It was unclear whether the testing instrument used by the District to evaluate Shroyer was purchased with general funds or with federal special education money. It was appar-

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ent that teachers and other staff members at the school attend workshops funded by federal dollars to receive training in how to deal with special education issues in their classrooms and buildings. There was clear evidence that the special education department receives and uses federal funds.

As will be discussed later in this opinion, the District did not have procedures in place when Dale Shroyer entered the high school to inform parents and students of their rights and the District's obligations under Section 504. Had such notice been provided, program decisions might have been made that created a stronger link between Dale Shroyer and federal funds received by the District. Decisions were made without access to this information. Even aside from this information gap which, if filled, might have led to a stronger nexus between this student and federal funds, there is a pervasive involvement in this case of the special education staff and a use of the special education procedures that brings Shroyer's education within the protections offered to those who are handicapped under Section 504.

The strongest case support for the position that Section 504 applies to Dale Shroyer is found in a California case, *Greater Los Angeles Council of Deafness v. Zolin*, 607 F. Supp. 175 (D.C. Cal. 1984), reversed in part in 812 F.2d 1103 (9th Cir. 1987). In GLAD the County of Los Angeles refused to provide sign language interpreters for deaf citizens called for jury duty. The lower court found that the plaintiffs failed to show federal financing of the Superior Court for the appropriate time period. In reaching this conclusion the lower court identified the Superior Court as the program or activity to consider rather than the total County.

In reviewing GLAD, the Ninth Circuit Court found that the County was the entity to consider rather than the Superior Court. This reversal was based on the facts that the defendants in the suit were County employees and the County's counsel had given advice to the defendants on whether the Superior Court had an obligation to provide interpreters. The fact that the County received federal funds was undisputed.

The nexus between the County and the defendants in GLAD is similar to the relationship of the Special Education Department and the District employees who dealt with Dale Shroyer in this case. Therefore, it is concluded that there was a sufficient connection between the federal funds received by the department of special education and Dale Shroyer to bring Shroyer's education under the protections offered by Section 504 and its accompanying regulations.

3. DID THE DISTRICT VIOLATE SECTION 504 BY FAILING TO IDENTIFY AND EVALUATE DALE SHROYER UPON HIS ENROLLMENT IN LATE SEPTEMBER 1986?

The local Hearings Officer identified this issue as the key issue in this case and decided it in favor of the guardian and student. I agree.

The transcript of the hearing makes it very clear that the District did not have mechanisms in place to notify students and parents of their rights and the District's obligations under Section 504. It was also clear that the vice principal who accepted Shroyer into the School was unaware that alcoholism is a handicapping condition under Section 504. Although the guardian told the vice principal and other District employees of Shroyer's past problems with alcohol, of his family's history of alcoholism, and of Dale Shroyer's past treatment for alcohol dependency, the information failed to bring an adequate response from the District. This information should have triggered an immediate concern and led to an evaluation of the student. It is immaterial that the guardian did not make a formal demand for a special education evaluation until approximately a month after the student's entrance. The thrust of Section 504 puts the burden on the recipient of federal funds, not the potential beneficiary of services, for recognizing a situation where an evaluation is needed. Specifically, 34 C.F.R. 104.35 states:

> (a) *Preplacement evaluation.* A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with paragraph (b) of this section of any person who, because of his handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.

The District asserts that statements in the District's Parent Handbook and Student Handbook were adequate notice of the student's rights. The statement in the Handbooks is as follows:

> Consistent with various federal and state regulations, the District provides a variety of specialized learning programs for students with hearing, vision, speech, physical, health, emotional, intellectual or specific learning handicaps. Many of these services are provided on the Hillsboro High School campus. Any student with an identified handicap is eligible to receive services from one or more of those programs.

There is no mention in either publication of the fact that alcoholism and drug dependency are handicaps within the meaning of the Vocational Rehabilitation Act. It would take a very perceptive parent to garner from the Parent or Student Handbook the notion that an alcoholic student qualifies as handicapped. The quoted language fails to provide sufficient notice coupled with the lack of provision by the District of any supplementary information of the meaning of "handicapped" under Section 504.

There are two Office for Civil Rights letters available for guidance on the issue of when a District has a duty to evaluate a student suspected of drug or alcohol abuse. The two are *York Illinois Community High School*, 3 EHLR 352:116 (1985) and *Lake Washington School District Number 414*, 1978-85 Sec. 504 Rulings EHLR 257:611 (1985). The *Lake Washington* case supports the petitioner's contention that the District should have been aware of the need for an evaluation and the *York* case supports the District's position that insufficient evidence was available at the time the student entered the District to alert District personnel to the need for an evaluation. After carefully reading and considering both letters, it is concluded that the facts of this case are closely akin to those of the *Lake Washington* case. Even though each of these cases is unique, there is enough parallel with the facts of the *Lake Washington* case to find its conclusion instructive, as the local Hearings Officer stated in his opinion. The opinion of the local Hearings Officer on this key issue is upheld.

4. DID THE DISTRICT VIOLATE SECTION 504's REQUIREMENT OF A FREE APPROPRIATE PUBLIC EDUCATION BY APPLYING TO DALE AN ATTENDANCE/CREDIT RULE THAT GENERALLY RESULTED IN A LOSS OF CREDIT WHEN A STUDENT IS ABSENT FOR 12 OR MORE DAYS DURING A SEMESTER?

The District has a clearly stated policy that limits students from earning credit for a subject if a student is absent for 12 or more days during a semester. The policy is based on sound educational reasons of making the award of credit consistent and credible. Testimony of the vice principal was that the rule is adhered to by the District except in a few cases where exceptional effort by a student has justified credit even though it abridged the 12 day rule.

At the time Dale entered Hillsboro High more than 12 days had already elapsed. Dale had not been in school elsewhere so no credit could be granted for work done in another District. Dale's guardian, Nyla Linscott, and Dale himself both were made aware of the attendance requirement and knew that he could not earn credit for the Fall semester. Nevertheless, both the guardian and the student agreed that he would attend all classes, be punctual, and attempt to do all the work.

The agreement between the District and the student was somewhat like an adhesion contract. The student and his guardian were unaware that there was any other possibility than to accept the terms for admission set forth by the vice principal. However, had they been aware that Section 504 requires "reasonable accommodation" to be made to allow handicapped persons to participate, a less one-sided agreement might have been possible. As the deal was struck, it gave a student with a history of school failure and truancy a requirement to attend all classes, participate and do assigned work, while knowing that no credit could be earned from the efforts. Assuming that class attendance and diligence are often problems for alcoholic teenagers as was acknowledged by the District's witness, it appears to have been a situation where a handicapped youngster was set up to fail. Although once the agreement was set up, the consequences of failing to meet the agreement had to be meted out, the infirmity was in drawing a boiler-plate agreement without reference to this student's individual needs.

Section 504 requires that the education for a handicapped student be individualized. (34 C.F.R. 104.33). I am not convinced that the District met its obligation of looking at this particular student discretely rather than woodenly applying a District policy to the detriment of a student. There is no evidence in the record that the District considered any possible arrangement at the time this student entered school other than an application of a set attendance policy.

On this issue, the local Hearings Officer found for the District. I reverse for the reasons stated above.

5. DID THE DISTRICT VIOLATE SECTION 504 BY CHANGING DALE'S PLACEMENT BETWEEN OCTOBER 14 AND NOVEMBER 20 WITHOUT INTERVENTION OF THE MULTI-DISCIPLINARY TEAM?

6. DID THE DISTRICT VIOLATE SECTION 504 BY OFFERING NO EDUCATIONAL SERVICES BETWEEN OCTOBER 14 AND NOVEMBER 26?

Dale was suspended on October 13, 1986, for "attendance, using foul language, and defiance." The suspension continued for six weeks. No educational services were provided for Dale during this time.

The regulation cited above, 34 C.F.R. 104.35(a), provides that an evaluation must be conducted before there is an initial placement of a handicapped student or before "any subsequent significant change in placement." The crux of the issue is whether the length and circumstances of Dale's suspension constituted a "significant change in placement." If so, the suspension should have been preceded by an evaluation and a MDT meeting.

Although brought under the EHA, the Ninth Circuit Court considered the meaning of 34 C.F.R. 104.35 and reached the conclusion that a significant change in program or services was a significant change in placement. *Doe v. Maher*, 793 F.2d 1470, 1487 (9th Cir. 1986) (*cert. granted* 1987). It is hard to imagine a more dramatic change in program and services than to be completely excluded from educational services for an extended period of time.

The petitioner concedes that not every suspension of a handicapped student is a significant change in placement. The length of the suspension, the possible danger to the student or others of his continued school attendance, and the possible connection between the behavior giving rise to the

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Cite as 1986-87 EHLR DEC. 508:371

suspension and the student's handicapping condition must be considered. The proper unit to conduct this consideration of a handicapped student's suspension is the student's multidisciplinary team. However, because Dale was not recognized as handicapped when he entered the school, he had no MDT and was being treated as an ordinary student. The initial error of non-identification led to the second error of a change in placement without evaluation or a MDT placement meeting.

The Hearings Officer at the local level found for the District on these two issues. I reverse for the reasons stated above.

7. DID THE DISTRICT VIOLATE SECTION 504 BY CONVENING THE TEAM ON NOVEMBER 20 WITHOUT INPUT FROM THE STUDENT AND GUARDIAN? WITHOUT THE PRESENCE OF PROFESSIONALS EXPERT IN DEALING WITH STUDENTS WITH ALCOHOL DEPENDENCY PROBLEMS? WITHOUT THE PRESENCE OF PERSONS FAMILIAR WITH THE STUDENT, THE MEANING OF EVALUATION DATA, OR PLACEMENT OPTIONS?

An initial meeting of Dale's MDT was held on November 12, 1986, to discuss preliminary results of Dale's testing and to consider possible educational alternatives. The guardian, student and guardian's attorney were present at this meeting. It was decided that a second meeting would be held to finalize program and placement decisions. The second meeting, held November 20, 1987, was not attended by the guardian, student, or their attorney. Notice of the meeting was not given to the attorney until one or two days prior to the meeting date. She was unable to attend and advised her clients not to attend without her presence.

The regulations do not require the involvement of the parent or guardian in making placement decisions. The regulations state that in making placement decisions a recipient shall:

> . . . (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. . . 34 C.F.R. 104.35(c).

The difficulty presented by this regulation is the phrase "persons knowledgeable about the child." Dale had been in the District for only fourteen days. Staff and teachers had had very little opportunity to become knowledgeable about him. Although a third MDT meeting was scheduled for November 26, it is clear that the critical decisions regarding program and placement were made on November 20th.

The District had a right to insist upon setting a MDT meeting as quickly as possible after receiving evaluation reports. Failure to do so could have led to charges of undue delay. However, in this particular case where little first hand knowledge about this student was available in the District, it would have been more reasonable for the District to work with the guardian and her attorney to select a mutually acceptable meeting date.

The Hearings Officer below concluded that the November 20th MDT meeting was properly constituted and conducted. I agree with his opinion except in regard to the absence at the meeting of persons knowledgeable about the child. The only persons who could have adequately filled this important role at the November 20th meeting, the guardian, student and their attorney, were unavailable on the date selected by the District.

8. DID THE DISTRICT VIOLATE SECTION 504's GUARANTEE OF A FREE APPROPRIATE PUBLIC EDUCATION BY PLACING DALE FOR THE PERIOD OF DECEMBER 1 - JANUARY 23 IN A PROGRAM OF HOME INSTRUCTION AND ALCOHOL ABUSE COUNSELING?

Prior to his suspension, Dale was participating in a regular class program and in addition was receiving alcohol abuse counseling at the school. The November 20th MDT meeting participants placed Dale Shroyer at home with five hours per week of home instruction and continued the counseling at the school. The home instruction was to continue to the end of the Fall semester after which Dale would return to school. Petitioner contends that this home placement violated the requirement in Section 504 for a handicapped student to be placed in the least restrictive environment. (34 C.F.R. 104.34)

There is little question that placement for home instruction is the most restrictive placement on the continuum of placements available for handicapped children. The regulations recognize this by requiring that a handicapped child remain in his or her regular school unless there are no supplementary aids and services that can make this possible. *Id.*

The jump from enrollment in a regular school program with alcohol counseling to homebound instruction five hours a week with a continuation of the counseling could only be supported by a District in extreme circumstances. Perhaps such a program change could be justified in a case where a student presents a serious threat to the safety of others if allowed to remain in school, or where a student's health problems require home care. These kinds of circumstances were not present in Dale Shroyer's case. The requirement to educate a handicapped student in the least restrictive environment was not met by the MDT's November 20th placement decision. For this reason, I reverse the local Hearings Officer's decision on this issue.

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9. DID THE DISTRICT VIOLATE SECTION 504 BY FAILING TO DEVELOP AN IEP FOR DALE ONCE HE WAS IDENTIFIED AS HANDICAPPED UNDER SECTION 504?

Compliance with Section 504 does not necessarily require a District to provide an IEP for a student who is handicapped under Section 504 but not under the Education for All Handicapped Children Act. The requirement is that the District provide a program designed to meet the individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met. 34 C.F.R. 104.33(b).

Failure to develop an IEP for Dale was not a violation of Section 504. For this reason I find for the District on this issue as did the Hearings Officer at the local hearing.

CONCLUSIONS AND FINAL ORDER

I find for the student on the two threshold issues (numbered 1 and 2 herein) and on stipulated issues 1 through 6 (numbered 3 through 8 herein). I find for the District on stipulated issue 7 (herein number 9).

The infirmities in the actions of the School District in this case stemmed from a failure to comply with the notice provisions of Section 504 and from a failure to identify Dale Shroyer's alcoholism as a handicapping condition when he first entered the District in September 1986. The District needs to ensure compliance with Section 504 through a program of staff training and through the institution of procedural safeguards. The Hearings Officer at the local hearing outlined a program in his ORDER for the District to follow. I concur in his recommendations and adopt his ORDER as the FINAL ORDER of this review without amendment.

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